No. 20,653

In the United States Court of Appeals for the Ninth Circuit

RICHARD C. PRICE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition to Review an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court on the petition of Richard C. Price (hereafter the "petitioner") to review an order of the National Labor Relations Board (R. 22-27)[1] dated August 25, 1965, dismissing an unfair labor practice complaint which had issued upon charges filed by petitioner. The Board's decision is

[1] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R."

reported at 154 NLRB No. 54. This Court has jurisdiction of the proceeding under Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), the alleged unfair labor practice having occurred in Santa Clara, California.

COUNTERSTATEMENT OF THE CASE

Briefly, the Board found that the Union[2] did not violate Section 8(b)(1)(A) of the Act when it suspended petitioner from membership because he had filed a petition with the Regional Director of the Board seeking to decertify the Union as the bargaining representative of the employees of the Company.[3] The facts upon which the Board's finding rests are contained in a stipulation, which was entered into in lieu of a hearing before, and decision of, a Trial Examiner. They may be summarized as follows:

The Company and the Union have been parties to several collective bargaining agreements covering the employees at the plant in Santa Clara, California (R. 15). One such contract, containing a lawful union-security clause, was in effect from September 1, 1962, to September 1, 1964 (R. 15-16). Petitioner, Richard Price, has been an employee of the Company since 1951 and a dues-paying member of the Union from 1951 until June 10, 1964. At all times relevant herein, Price was subject to the union-security provi-

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[2] United Steelworkers of America, Local No. 4028, AFL-CIO.

[3] Pittsburgh-Des Moines Steel Company.

sion of the 1962 contract between the Company and the Union (R. 17).

On April 15, 1964, Price filed a petition with the Regional Director of the Board seeking an election to withdraw from the Union the authority to enter into a union shop agreement (R. 3, 16). Thereafter, as Price had intended to file a decertification petition, he sought, and obtained, approval from the Regional Director to withdraw the union shop petition. On June 3, 1964, Price filed another petition with the Regional Director, this time seeking to decertify the Union as the bargaining representative of the employees of the Company (R. 4, 5, 16).

On May 13, 1964, three other employees of the Company, who were also members of the Union, filed charges with the Union alleging that Price, by filing the petition with the Board, had violated Article XII, Section 1(d), of the Steelworkers' International Constitution.[4] Price appeared before the Union's Trial Committee on June 1, 1964, and was found guilty of violating the Steelworkers' Constitution as charged (R. 17). The Trial Committee recommended to the general membership of the Union that Price be (1)

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[4] Article XII, Section 1(d), of the Constitution provides (R. 17):

> Any member may be penalized for committing any one or more of the following offenses: . . .
>
> (d) advocating or attempting to bring about the withdrawal from the International Union of any Local Union or any member or group of members; . . .

Article XII, Section 2, of the Constitution provides:

> Any member convicted of any of one or more of the above offenses may be fined, suspended, or expelled.

suspended from membership and precluded from attending meetings for five years; (2) fined $500 plus costs of the hearing; and (3) suspended from membership completely pending payment of the fine (R. 17-18). On June 10, 1964, the findings and recommendations of the Trial Committee were approved and accepted by the membership of the Union (R. 18). Upon Price's appeal to the Steelworkers' International Executive Board, the fine was withdrawn but the suspension from membership was left in full force and effect (R. 18). Although, under the Steelworkers' Constitution, Price was permitted to appeal the decision of the Executive Board to the regular International Convention, no further action was taken by him (R. 18).

However, Price filed charges with the Board, alleging that the Union, by fining and suspending him, had violated Section 8(b)(1)(A) of the Act. The Board found that the Union did not violate Section 8(b)(1)(A) by suspending Price for filing a petition seeking the decertification of the Union as the bargaining representative of the employees, and dismissed the complaint. (R. 22, 26-27.)

ARGUMENT

The Board Properly Held That Section 8(b)(1)(A) Was Not Intended To Prohibit A Union From Suspending One Of Its Members For Filing A Petition Seeking To Decertify The Union As The Representative Of The Employees

A. *Introduction*

Section 8(b)(1)(A) of the Act, enacted by Congress as part of the 1947 Taft-Hartley amendments,

provides that it shall be an unfair labor practice for a union:

> to restrain or coerce employees in the exercise of the rights guaranteed in Section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

The Section 7 rights referred to are "the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Moreover, Section 7 guarantees "the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

This case involves the authority of a union to suspend one of its members for filing a decertification petition against the Union.[5] Setting this question

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[5] As shown above, although the Union also imposed a fine on Price for filing his decertification petition, this fine was later withdrawn by the International Executive Board following an appeal by Price. (R. 25). The Board therefore found that there was no obligation on Price to pay such a fine and for this reason the initial levy of the fine was not considered on "operative factor" in the Board's decision (R. 27). Petitioner now contends that this finding of the Board is "erroneous" since the mere levying of the fine was coercive, notwithstanding the ultimate withdrawal of the fine (Pet. br. pp. 25-27).

The Board's finding on the fine is clearly correct. Price

within the framework of Section 8(b)(1)(A) of the Act, the issue is whether such action by the Union here constitutes the type of "restraint and coercion" intended to be proscribed by that section. For, as the Supreme Court recognized in *N.L.R.B.* v. *Drivers, Chauffeurs, Helpers, Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274, Section 8(b)(1)(A) does not encompass all union action which in a literal sense tends to restrain or coerce employees in the exercise of their Section 7 rights.[6]

As we show below, Section 8(b)(1)(A) was essentially aimed at strong-arm tactics in union organizing campaigns and at interferences with employment status. It was not intended to preclude a union, by such traditional sanctions as fines, suspension or expulsion, from disciplining its members for violating reasonable union rules necessary to the

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was not finally obligated to pay the fine until he had exhausted the appeal procedures available to him under the Union's Constitution. Once the Executive Board upheld his appeal, this element of the case became irrelevant. In any event, the Board's holding in the instant case assumes that there is some coercion and restraint involved when a union suspends one of its members; the question is whether this action, be it suspension or fine, is the sort of coercion and restraint that is prohibited by Section 8(b)(1)(A) of the Act. See, *Local 283, UAW (Wisconsin Motors)*, 145 NLRB 1097, 1101-1102; *Cannery Workers Union of the Pacific (Van Camp Sea Food Co., Inc.)*, 159 NLRB No. 47. Thus, the Board could properly find that the initial fine imposed on petitioner need not be considered here.

[6] In *Curtis*, the Court held that Section 8(b)(1)(A) did not reach peaceful picketing by a minority union to secure recognition.

existence of the union as an entity. We further show that the action taken here fell in this category.[7]

B. *The legislative history of the 1947 amendments shows that Congress did not intend to regulate traditional union power to discipline its members for a violation of reasonable union rules*

1. *The situation prior to 1947*

Prior to 1947, "there was no federal statute which specifically regulated, in even a slight degree, the internal affairs of labor unions."[8] Under what circumstances, and by what procedures, a union might

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[7] A simlar issue was before, but not resolved by, this Court in *Associated Home Builders* v. *N.L.R.B.*, 352 F. 2d 745 (C.A. 9). In that case, the Board had found that the Union did not violate Section 8(b)(1)(A) by fining its members for exceeding production quotas established by the Union. 145 NLRB 1775. This Court, noting that the problem was a difficult one, found it "unnecessary" to decide whether Section 8(a)(1)(A) barred a fine levied for that purpose (352 F. 2d at 750). Instead, it concluded that, since the Union's action appeared to constitute a unilateral change in working conditions, the relevant question was whether the Union had violated its bargaining obligation under Section 8(b)(3) of the Act, and, accordingly, remanded the case to the Board for a determination of that question.

In *Allis-Chalmers Mfg. Co.* v. *N.L.R.B.*, 358 F. 2d 656, the Seventh Circuit, sitting *en banc* and with three judges dissenting, held, contrary to the Board, that Section 8(b)(1)(A) barred a union from fining those of its members who crossed a picket line during a lawful strike authorized by a majority of the union members. The Board has petitioned the Supreme Court for certiorari to review this decision, No. 1398, October Term, 1965.

[8] Aaron and Komaroff, *Statutory Regulation of International Union Affairs*, 44 Ill. L. Rev. 425, 427 (1949); *I.A.M.* v. *Gonzales*, 356 U.S. 617, 620.

> they desire, but that they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or other job discrimination against, an employee. . . . [Senate Report No. 105 on S. 1126, pp. 20-21, LH 426-427.]

Similarly, when the above amendments were debated on the floor, Senator Pepper protested that they would deprive a union of power to protect itself against company spies in its ranks, wildcat strikers, and those who opposed what the majority of the union felt was in the union's best interest (LH 1094, 93 Cong. Rec. 4191). Senator Taft replied (LH 1097, 93 Cong., Rec. 4193):

> The pending measure does not propose any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they still will be able to try any of their members. All that they will not be able to do, after the enactment of this bill is this: If they fire a member for some reason other than nonpayment of dues, they cannot throw him out of work. That is the only result of the provision under discussion.

(b) Section 8(b)(1)(A), which the Senate considered immediately after the Pepper-Taft colloquy, was not intended to erase the deliberate line between enforcing reasonable union rules by affecting the employee's job and by means short thereof, which Congress drew in amending Section 8(a)(3) and adding Section 8(b)(2).

Thus, when Senator Ball introduced Section 8(b)(1)(A) in the Senate, he stated (LH 1018, 93 Cong. Rec. 4136):

> The purpose of the amendment is simply to provide that where unions, in their organizational campaigns, indulge in practices which, if an employer indulged in them, would be unfair labor practices, such as making threats or false promises or false statements, the unions also shall be guilty of unfair labor practices.

Similarly, Senator Taft, who supported the amendment, stated (LH 1025, 93 Cong. Rec. 4142):

> The language [of Section 8(b)(1)(A)] is clear . . . . An employer cannot go to an employee and say, "If you join this union you will be discharged." He cannot go to an employee and threaten physical violence. He cannot employ police to accomplish that purpose. Now it is proposed that the union be bound in the same way. What could be more reasonable than that? Why should a union be able to go to an employee and threaten violence if he does not join the union? Why should a union be able to say to an employee, "If you do not join this Union we will see that you cannot work in the plant"? What possible distinction can there be between an unfair labor practice of that kind on the part of an employer and a similar practice on the part of a union? We know that such things have actually occurred. We know that men have been threatened. There have been many cases in which unions have threatened men or their wives. They have called on them on the telephone and insisted that they sign bargaining cards. They have said to them "Sooner or later we are going to organize this plant with a closed shop, and you will be out." It seems to me perfectly clear that that is a reprehensible practice, and one which

> is just as reprehensible and just as limiting on the rights of the employees guaranateed by the Wagner Act as would be an unfair labor practice on the part of employers.

See also LH 1205-1206, 93 Cong. Rec. 4562.

As the Supreme Court pointed out in the *Curtis* case, *supra*, the examples given in the debates show that Section 8(b)(1)(A) was designed essentially to prevent strong-arm tactics and threats of job loss in organizational campaigns. None of the active proponents of the measure suggested that it would limit the preexisting right of a union to discipline its members—by such traditional means as fines, suspension, or expulsion—for violating reasonable union rules or policies. Indeed, when Senator Holland introduced a proviso to Section 8(b)(1)(A), to make clear that the section did not affect the area of internal union affairs (LH 1139, 93 Cong. Rec. 4398),[11] Senator Ball readily accepted it. He stated (LH 1141, 93 Cong. Rec. 4400): "It was never the intention of the sponsors of the amendment to interfere with the internal affairs or organization of unions. The amendment of the Senator from Florida [Holland] makes that perfectly clear." and later, Senator Ball added (LH 1200, 93 Cong. Rec. 4433): "The modifications [the proviso] is designed to make it clear that we are not trying to interfere with the in-

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[11] The proviso reads:

> *Provided,* That this subsection shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

ternal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its effort to organize unorganized employees."

C. *The 1959 amendments confirm the above analysis*

The Labor-Management Reporting and Disclosure Act, enacted in 1959, confirms the above analysis. Although that statute does regulate internal union affairs and provides a "bill of rights" for union members, Congress recognized (Section 101(a)(5), 29 U.S.C. 411(a)(5)) that a union member "may be fined, suspended, expelled, or otherwise disciplined" provided certain procedural safeguards were observed. Moreover, Congress added a proviso (Section 101(a)(2), 29 U.S.C. 411(a)(2)) disclaiming any intent ". . . to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution. . . ." It is hardly likely that Congress would have adopted these provisions, allowing the enforcement of reasonable union rules by such sanctions as fines, suspension, or expulsion, had it 12 years earlier flatly interdicted such measures under Section 8(b)(1)(A).

D. *The union discipline here did not fall outside the area of internal union affairs*

Petitioner was suspended from union membership for violating the provision of the Steelworkers' Constitution which barred any member from "advocating or attempting to bring about the with-

drawal from the International Union of any Local Union or any member or group of members." Such a rule is plainly necessary to preserve the very existence of the union, for no union could long endure if it permitted one or more of its members, with impunity, to undermine it by promoting defection from the union. As an individual, the member, of course, has the right to engage in such conduct and the union could not get him fired from his job for doing so, but it does not follow that the union is required to keep him as a member or is prevented from invoking other forms of discipline. By filing a petition with the Board to decertify the Union as the bargaining representative of the employees, petitioner encouraged defection from the Union and jeopardized its status, no less than if he had solicited the employees directly to withdraw from the Union. The Union thus properly found that petitioner had violated the above provision of its constitution, and therefore it could, without violating Section 8(b)(1)(A), discipline him by the traditional sanction which it used, i.e., suspension from membership. As the Board stated in *Tawas Tube Products, Inc.*, 151 NLRB 46, 47-48, in holding that the union could properly expel two employees for similar action in filing a decertification petition:

> . . . the ground for the expulsions plainly related to a matter of legitimate Union concern and one which may properly be a subject matter of internal discipline. In this connection, even a narrow reading of the proviso would necessarily allow a union to expel members who attack the

> very existence of the union as an institution. . . . As we said in the *Allis-Chalmers* case [149 NLRB 67], when a situation "involves the loyalty of its members during a time of crisis for the union . . . we cannot hold that a union must take no steps to preserve its own integrity." That language is even more applicable here, for we can conceive of no conduct by a union member more hostile or threatening to his union than that engaged in by Lohr and Lee. . . .[12]

Petitioner concedes (br. p. 16) that the legislative history of Section 8(b)(1)(A) "affords some basis" for the Board's conclusion that that section does not reach the area of internal union affairs.[13] Petitioner

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[12] It is true, as petitioner points out (br. pp. 20-21, n. 28), that *Tawas Tube* was a representation case and not an unfair labor practice decision, but the Board's rationale and its interpretation of Section 8(b)(1)(A) in that case are clearly applicable to the instant case. The Board itself so recognized by relying on *Tawas Tube* in its decision here.

[13] Petitioner errs in asserting (br. p. 10, n. 8), that this Court has been critical of the Board's construction of Section 8(b)(1)(A). As shown in n. 7, *supra*, in *Associated Home Builders of East Bay, Inc.* v. *N.L.R.B.*, 352 F. 2d 745 (C.A. 9), the Court remanded the case to the Board to determine whether the union's setting of production quotas was violative of Section 8(b)(3). In so ruling, the Court specifically declined to pass on the Board's construction of Section 8(b)(1)(A). *Id.*, at 750. After a brief discussion of the legislative history of Section 8(b)(1)(A), the Court noted only that "the answer is by no means clear," that it had "been unable to find any authoritative decisions which will furnish us answers," and that "[f]ortunately we find it unnecessary to solve these problems" raised by Section 8(b)(1)(A). *Id.*, at 750-751, n. 9. The only adverse decision to date is that of the Seventh Circuit in the *Allis-Chalmers* case, and, as noted above, the Board has filed a petition for a writ of certiorari to review that decision.

urges, however, that more is involved in this case than merely an internal matter and that the Board's decision herein is contrary to its decisions in *Local 138, Operating Engineers (Charles S. Skura)*, 148 NLRB 679, and *H.B. Roberts (Wellman-Lord Engineering, Inc)*, 148 NLRB 674, enforcement granted *sub nom. Roberts* v. *N.L.R.B.*, 350 F. 2d 427 (C.A. D.C.). The Board properly distinguished these cases.

In both *Skura* and *Roberts*, the union fined a member for filing unfair labor practice charges against the union without first exhausting internal union procedures. The gravamen of the charges was that the union was attempting to cause job discrimination against the member, in violation of Section 8(b)(2) and (1)(A) of the Act. The Board found that, in these circumstances, the fine violated Section 8(b)(1)(A). The Board concluded that a union rule which limited access to the Board's procedures by employees alleging union infringement of their statutory rights was unreasonable and exceeded the province of legitimate internal union affiairs. Accordingly, the restraint and coercion flowing from a fine to enforce such a rule was not privileged as a mere regulation of those affairs. The exception thus recognized by the Board is a limited one; as the District of Columbia Circuit stated in affirming the Board's *Roberts* decision (350 F. 2d at 430):

> We limit our approval of the Board's construction of its powers to the case before us, where the fine was not imposed because of the member's harassing conduct as a member, but, as the case is presented to us, simply because he filed the

charges or did so without pursuing possible internal remedies.

The instant case presents a different situation. By filing his decertification petition, Price resorted to the Board solely for the purpose of attacking the very existence of the Union itself, and not, as in *Skura* and *Roberts*, to vindicate a statutory wrong.[14] And the Union, in disciplining Price, was not seeking to block him from obtaining redress for an alleged statutory wrong, but was merely attempting to preserve its own status, which was a lawful one. In short, the Union here had not committed a statutory wrong.[15] but was mere-

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[14] See *Wood, Wire and Metal Lathers Union* (*Phillip A. Contreras, Jr.*), 156 NLRB No. 93, 61 LRRM 1172, a case identical with *Skura* and *Roberts*. See also *Houston Typographical Union No. 87* (*Don P. Bosworth*), 158 NLRB No. 104, 62 LRRM 1174, where a union member filed charges against his union alleging an attempt to cause the employer to discharge him, and later withdrew the charges when the union ceased its attempts to have him fired. The union then moved to assess the member $100 to pay for the legal expenses it had incurred while the charges were outstanding against it. The Board held that this "assessment" for legal costs was the equivalent of a fine for filing charges, and violative of Section 8(b)(1)(A) under *Skura*. Cf. *Ryan, et al.* v. *I.B.E.W.*, —— F. 2d —— (C.A. 7), decided June 10, 1966, 62 LRRM 2339. See also, *Cannery Workers Union of the Pacific* (*Van Camp Sea Food Co., Inc.*), 159 NLRB No. 47.

[15] There is thus a real difference between this case and the hypothetical posited by petitioner (br. pp. 23-24) where an employee-union member files a Section 8(a)(2) charge against his employer and is disciplined by the union for doing so. For in that case, the gravamen of the charge is that the union is not the lawful representative of the employees but has been foisted on the employees by reason of employer assistance or support. Although the end result of an 8(a)(2) charge might be the same as with the filing of a decertifica-

ly performing, in a lawful way, the precise function which it was established for, i.e., representing employees for collective bargaining. By filing a decertification petition, petitioner was not seeking to redress a wrong committed by the Union, but was attempting, by unseating the Union as the representative, to prevent it from continuing to fulfill its very purpose for existing. Hence, here, no less than if petitioner had engaged in rival union activity or had openly solicited defections from the Union, the Union should not be powerless to defend its integrity. The Board could thus properly conclude that, in the circumstances here, it was not "beyond the competence of the Union to protect itself . . . by the application of reasonable membership rules and discipline." *Tawas Tube Products, Inc., supra.*

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tion petition—the union would have to win a Board-convicted election in order to continue as bargaining representative—the underlying purpose of the 8(a)(2) charge, unlike the case at bar, is to vindicate a statutory wrong allegedly committed by the employer. As noted above, there is no suggestion that the Union's status here was unlawful.

CONCLUSION

For the reasons stated above, we respectfully submit that the Board's decision dismissing the unfair labor practice complaint should be sustained and the prayers of the petition for review should be denied.

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June 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of the Court and in his opinion the tendered brief conforms to all requirements.

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